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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

FREDY ALARCON, Plaintiff and Appellant, v. FIRESIDE BANK, Defendant and Appellant.	A117148 & A118566 (Alameda County Super. Ct. No. RG04178229)

In March 2003, plaintiff Fredy Alarcon (Alarcon) purchased a used vehicle under a conditional car sales contract from Auto Warehouse (AW), a Fremont car dealership. AW sold Alarcon's car sales contract to defendant Fireside Bank (Fireside), an automobile finance company that buys such contracts under the terms of master agreements with various car dealerships. In October 2004, Alarcon sued AW and Fireside on the sales contract under various causes of action. After a bench trial in November 2006 involving only Alarcon and Fireside, the trial court entered judgment in January 2007 in favor of Alarcon and against Fireside.

Fireside appeals the judgment in case number A117148, contending (1) Alarcon was not entitled to rescission of the contract; and (2) even if Alarcon was entitled to rescission, the trial court underestimated the offset it awarded Fireside for Alarcon's use of the vehicle during the term of the contract. On cross-appeal, Alarcon contends the trial court erred by allowing Fireside an offset against a refund of payments he made under the contract. In

case number A118566, Fireside contends the trial court's post-judgment order awarding Alarcon attorney fees in the amount of $125,019 was improper. Having consolidated the appeals for purposes of briefing and argument, we now affirm in part and reverse in part.

BACKGROUND

Alarcon filed his complaint for damages on October 1, 2004. In the complaint, Alarcon alleged in pertinent part as follows: On or about March 4, 2003, he entered into an conditional sale contract with AW for the purchase of a used 2000 Toyota RAV4 for a cash price of $9,750; all contract negotiations were in Spanish but AW did not provide him with a Spanish version of the sales agreement; and, AW failed to disclose amounts paid to public officials under the conditional sale contract. Alarcon also alleged AW charged him $289 for license fees on line 2.A of the contract, but the DMV registration card shows actual license fees paid were in the amount of $112; and AW failed to refund the amount of the overcharge. Alarcon further alleged that AW did not give him a hard copy of the finance terms before he executed the contract; and, AW subsequently assigned the contract to Fireside.

Alarcon alleged AW engaged in acts of unfair competition as defined in Business and Professions Code section 17200 by (1) failing to provide Spanish contracts to consumers who negotiate in Spanish, in violation of Civil Code section 1632[1]; and, (2) by overcharging for vehicle registration fees and failing to disclose credit terms, in violation of the Rees-Levering Automobile and Sales Finance Act (ASFA), section 2981 et seq. Alarcon further alleged causes of action for negligent misrepresentation, false advertising, and fraudulent concealment against AW.

Additionally, in his sole cause of action against Fireside, Alarcon sought declaratory relief that he is entitled to "bring all equities and defenses he has against [AW] against Fireside" under ASFA's assignee liability rule set forth in section 2983.5, subdivision (a),[2]

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[1] Further statutory references are to the Civil Code unless otherwise noted.

[2] Section 2983.5 states in pertinent part: "An assignee of the seller's right is subject to all equities and defenses of the buyer against the seller, notwithstanding an agreement to the

and also under the FTC Holder Clause inserted in the contract.[3] The FTC Holder Clause states: "Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto." Alarcon sought a declaration that the purchase contract assigned to Fireside by AW is rescinded, that the remaining debt under the contract is cancelled and that he is entitled to a return of all payments he made under the contract. Alarcon also requested costs and attorneys fees.

A bench trial took place on November 1, 2006,[4] and the trial court issued a tentative decision on November 3, 2006. After further briefing the trial court reopened the trial on December 20, 2006, and received additional evidence on the issues of (1) Alarcon's due diligence in pursuing his remedies and (2) the amount of the offset, against a refund of the purchase price, Fireside was entitled to as a result of Alarcon's use of the vehicle.[5] The trial court issued its statement of decision (SOD) on January 3, 2007.

The trial court's SOD included the following findings: On March 4, 2003, Alarcon purchased the 2000 Toyota RAV4 from AW by paying $2,000 down and financing the balance of the $9,750 cash purchase price. The negotiations were conducted entirely in Spanish but Alarcon was presented with a contract in English. The total fees paid to the DMV by AW on Alarcon's behalf amounted to $112. The contract, however, reflected a total payment of $289, a difference of $177. Also, the section of the contract showing "Amounts Paid to Public Officials" listed an aggregate sum of $289 for license fees and was not broken down into separate amounts as provided for under the contract in the lines, "A. License Fees" and "B. Registration /Transfer /Titling Fees." The trial court concluded that

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contrary, but the assignee's liability may not exceed the amount of the debt owing to the assignee at the time of the assignment." (§ 2983.5, subd. (a).)

[3] As the trial court noted, the Holder Clause contained in the contract is mandated by the Federal Trade Commission (FTC) pursuant to 16 C.F.R. § 433.2.

[4] The trial only involved Alarcon and Fireside — AW defaulted and its surety settled before trial.

[5] We shall refer *post* to this phase of the trial as "the reasonable diligence hearing."

AW's failure to provide a Spanish language contract, and to state correctly and itemize the two subcategories of DMV fees, constituted violations of sections 1632 and 2892, subdivision (a)(2) [of the ASFA], respectively.

In its SOD, the trial court also found: AW sold Alarcon's contract to Fireside. Fireside has no personnel present at the point of sale and had no dealings with Alarcon directly. At or about the time Fireside purchases sales contracts from dealers, it checks some of the information in the contract. Shortly after each purchase, Fireside receives a registration card from DMV reflecting the actual amounts paid by the dealer on behalf of the purchaser. Fireside does not have a practice of checking the information received from the DMV against amounts appearing on the contracts it has purchased.

Also, the trial court in its SOD found: After Fireside purchased the Alarcon contract, Alarcon made payments on the vehicle through May 2006 amounting to $9,434.28 and as of October 11, 2006, had an outstanding balance of $5,804.69. The outstanding balance reflects a credit of $177 on October 4, 2006. This credit was applied shortly after Alarcon's deposition and was intended to correct the original overcharge of DMV fees. When Alarcon purchased the vehicle it had a mileage of 83,828 miles and at date of trial the mileage on the vehicle was approximately 152,000 miles. Generally, Alarcon has no complaints about the vehicle and it has run well over the past three years.

Based on these factual findings, the trial court analyzed Fireside's statutory liability and made its legal conclusions. The trial court concluded AW violated the ASFA in two respects: (1) by its "patent failure to itemize the two subcategories of DMV fees," and, (2) by overstating the amount paid to the DMV on Alarcon's behalf.

In regard to the failure to itemize the two subcategories of DMV fees, the trial court further concluded that because this violation appears on the face of the contract, Fireside was not a bona fide purchaser who acquired the contract without actual knowledge of the violation. Accordingly, the court concluded that Fireside was not excused from the violation under section 2982, subdivision (a), and therefore could not enforce the contract against Alarcon.

As to the second ASFA violation by AW, namely, the contract overcharge on the DMV fees, the trial court concluded that Fireside did not acquire the contract with actual knowledge of the violation and was therefore a bona fide purchaser under section 2982, subdivision (a).[6] Thus, the court concluded that ASFA did not preclude Fireside from enforcing the contract on account of AW's overcharge on DMV fees.

Having decided Fireside was liable under the applicable statutes, the trial court next addressed whether Alarcon was entitled to rescind the contract. The trial court noted that under ASFA, a buyer must act with reasonable diligence in seeking rescission. The trial court concluded Alarcon acted with reasonable diligence because "he could not be expected to identify the very technical [ASFA] violation . . . on his own, [and once] he [] became aware of it when he consulted an attorney," he pursued his remedy with appropriate diligence. The court next concluded that ASFA section 2983.1 precluded any offset for depreciation in the value over time, but did not preclude an offset for Alarcon's use of the vehicle for 70,000 miles. In arriving at an appropriate offset, the court decided upon 10 cents per mile, or $7,000, which the court described as " 'rough justice' " and "a little over half of the full lease value estimated by the defense expert and also a little over the average of the two competing calculations offered by the parties."

Judgment was entered in favor of Alarcon on January 3, 2007. The trial court rescinded the conditional sale contract, cancelled the remaining debt under the contract, and awarded Alarcon restitution in the net sum of $469.28. The court calculated restitution in the net sum of $469.28 by adding together Alarcon's down payment of $2,000 and his payments totaling $9,434.28 for a sum of $11,434.28. From that sum, the court subtracted

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[6] The trial court further concluded that AW violated section 1632 by failing to provide Alarcon with a Spanish translation of the contract. The trial court noted that section 1632 is not enforceable in a direct action by the buyer against the holder of the contract. However, with respect to the section 1632 violation, as well as the second ASFA violation (overcharge on DMV fees), the trial court concluded that the FTC "holder clause" in the contract made Fireside directly liable to Alarcon on those violations. As noted below, however, we need not address the FTC holder clause issue in this opinion. (See Discussion, section A. Rescission, *post* at p.6.)

$7,000 as an offset for use of the vehicle, and the amount of $3,965 previously received in settlement from Union Pacific Insurance Company, surety for AW. Fireside filed a timely notice of appeal on March 2, 2007. On March 5, 2007, Alarcon filed a motion for attorney's fees. On July 12, 2007, the trial court filed an order concluding Alarcon was entitled to attorney's fees under ASFA and awarded fees in the sum of $125,019. Fireside filed a notice of appeal against the court's post-judgment order regarding attorney's fees on July 24, 2007.

DISCUSSION

A. Rescission

Fireside contends that Alarcon is not entitled to rescission under ASFA on two separate grounds: (1) Fireside was entitled to enforce the contract as a bona fide purchaser; and, (2) Alarcon failed to act with reasonable diligence. For reasons more fully explained below, we conclude that the trial court properly granted rescission under ASFA. Accordingly, we need not address Fireside's separate claim that Alarcon is not entitled to rescission under the FTC Holder Clause.[7]

1. Applicable ASFA Provisions

ASFA was enacted "to protect motor vehicle purchasers from abusive selling practices and excessive charges by requiring full disclosure of all items of cost. (Citation.)" (*Thompson v. 10,000 RV Sales, Inc.* (2005) 130 Cal.App.4th 950, 966 (*Thompson*).) In furtherance of this objective, ASFA requires that "every conditional sale contract must disclose to the buyer all details concerning the sale, financing, and complete costs of purchasing the vehicle. (Citations) . . . The ASFA's requirements are mandatory. (Citation.)" (*Ibid.*)

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[7] We note that no California case has squarely addressed the scope and extent of buyers' remedies under the FTC Holder Rule, in particular the issue of whether a buyer may be afforded affirmative relief (such as rescission) only if the seller failed to perform or the buyer received "little or nothing of value from the seller." (See *Beemus v. Interstate National Dealer Services* (Pa. 2003) 823 A.2d 979, 983 [noting split in authority on issue].)

In particular, section 2982, subdivision (a) requires that every conditional sale contract must contain certain enumerated disclosures under a section of the contract labeled "itemization of the amount financed." (§ 2982, subd. (a).) Moreover, the disclosures required under section 2982, subdivision (a) must be made "in the sequence set forth in that subdivision" and may not be "itemized or subtotaled" to a lesser extent than required by that subdivision. (§ 2982.) As pertinent here, among the mandatory disclosures required under section 2982 is an itemization of the *amounts* to be paid to public officials for vehicle license fees, registration, transfer and titling fees. (See § 2982, subd. (a)(2).)

ASFA further provides that "[i]f the seller . . . violates any provision of Section 2981.9 or of subdivision (a), (j), or (k) of Section 2982, the conditional sale contract shall not be enforceable, *except by a bona fide purchaser, assignee or pledgee for value* or until after the violation is corrected as provided in Section 2984, and if the violation is not corrected the buyer may recover from the seller the total amount paid, pursuant to the terms of the contract, by the buyer to the seller or his assignee." (§ 2983, italics added.)

Section 2983.1 of ASFA addresses circumstances under which a seller and/or holder can enforce a conditional sale contract despite a violation of ASFA, and delineates the remedies available to buyers in circumstances where the contract is unenforceable. (§ 2983.1.) Paragraph 2 of section 2983.1 states that "[i]f a holder acquires a conditional sale contract *without actual knowledge* of the violation by the seller[,] . . . the contract shall be valid and enforceable by such holder except (unless the violation is corrected as provided in Section 2984) the buyer is excused from payment of the unpaid finance charge." (§ 2983.1, second par. [italics added].) Paragraph 3 of section 2983.1 states that "[i]f a holder acquires a conditional sale contract *with knowledge* of [the violation by the seller], . . . the conditional sale contract shall not be enforceable except by a bona fide purchaser, assignee or pledgee for value or unless the violation is corrected as provided in Section 2984, and if the violation is not corrected the buyer may recover from the person to whom

payment was made the amounts specified in Section 2983."[8] (§ 2983.1, third par. [italics added].)

Paragraph 4 of section 2983.1 sets forth the buyer's choice of remedies if the contract is unenforceable: "When a conditional sale contract is not enforceable under Section 2983 or 2983.1, the buyer may elect to retain the motor vehicle and continue the contract in force or may, *with reasonable diligence*, elect to rescind the contract and return the motor vehicle. The value of the motor vehicle so returned shall be credited as restitution by the buyer *without any decrease which results from the passage of time* in the cash price of the motor vehicle as such price appears on the conditional sale contract." (§ 2983.1, fourth par. [italics added].)

2. Bona Fide Purchaser

Fireside contends that the trial court erred in awarding Alarcon rescission because ASFA does not allow rescission against a bona fide purchaser for value such as Fireside. We agree with the parties that Fireside's contention presents an issue of statutory interpretation that we review de novo (*People ex rel. Lockyer v. Shamrock Foods Co.*, (2000) 24 Cal.4th 415, 432), bearing in mind that under "well-established principles" of statutory construction "[i]f the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls." (*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818.)

Fireside's contention rests principally on the language of the third paragraph of section 2983.1, which states in pertinent part: "If a holder acquires a conditional sale contract *with knowledge* of such violation of Section 2981.9 or of subdivision (a), (j), or (k) of section 2982, the conditional sale contract shall not be enforceable except by a *bona fide purchaser*, assignee or pledgee for value. . . ."[9] Fireside reads the third paragraph of section

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[8] Under section 2983, "the buyer may recover from the seller the total amount paid, pursuant to the terms of the contract, by the buyer to the seller or his assignee." (§ 2983.)

[9] The second paragraph of section 2983.1 addresses the situation where "a holder acquires a conditional sale contract *without* ***actual*** *knowledge of the violation by the seller*:" Whereas, the third paragraph address the situation where "a holder acquires a conditional

2983.1 to mean that a holder who acquires a conditional sale contract, with knowledge of a seller's ASFA violation, can enforce the contract as long as the holder is a bona fide purchaser for value. Because Fireside contends it was a bona fide purchaser for value of Alarcon's contract, Fireside asserts it may enforce Alarcon's contract even if it took with knowledge of the seller's ASFA violation. We disagree.

"Pursuant to established principles, our first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. (Citations.) Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. (Citation.)" (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.) "If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. If there is ambiguity, however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. In such cases, we select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the

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sale contract *with knowledge* of such violation." (§ 2983.1 [italics and bold added].) There is no indication in the legislative history that the Legislature intended a different standard of knowledge (actual as opposed to constructive, see § 18) to apply to the alternate scenarios described in paragraphs two and three. Therefore, we must assume the omission of the word "actual" from the third paragraph results from scrivener's error. (*Gray Cary Ware & Freidenrich v. Vigilant Ins. Co.* (2004) 114 Cal.App.4th 1185, 1193-1194 (courts may "correct an obvious and minor drafting error where necessary to effectuate the intent of the Legislature"). Accordingly, in our analysis of the third paragraph of section 2983.1 we shall apply the actual knowledge standard as defined by law.

statute, and avoid an interpretation that would lead to absurd consequences." (*Estate of Griswold* (2001) 25 Cal.4th 904, 910 [citations omitted].)

Paragraphs two and three of section 2983.1 address the rights of the buyer where the conditional sale contract violates "section 2981.9 or [] subdivision (a), (j), or (k) of section 2982." (§ 2983.1, second & third pars.) Under paragraph two, if the holder acquires a conditional sale contract *without actual knowledge* of any of the specified ASFA violations, then the holder may enforce the contract. However the buyer is excused from payment of any unpaid finance charge.[10] Under paragraph three, on the other hand, if the holder acquires a conditional sale contract *with [actual] knowledge* of any of the specified ASFA violations, then "the conditional sale contract shall not be enforceable *except* by a bona fide purchaser, assignee or pledgee for value *or* unless the violation is corrected as provided in Section 2984." (§ 2983.1, third par.) These paragraphs make clear that a holder who acquires without actual knowledge of an ASFA violation may still enforce the contract, at least in part, whereas a holder who acquires with [actual] knowledge of the ASFA violation may not, and may be subject to rescission under paragraph four of section 2983.1. (§ 2983.1, second & third pars.) The statutory mechanism set forth in paragraphs two and three reflects a clear legislative intent: (1) to provide buyers with greater rights against a holder who acquired with [actual] knowledge of any of the specified ASFA violations (paragraph three) as opposed to a holder who acquired without such knowledge (paragraph two), and (2) to impose more severe penalties and restrictions upon a holder who acquired with [actual] knowledge of any of the specified ASFA violations (paragraph three) compared to one who acquired without such knowledge (paragraph two). (*Dixon Mobile Homes, Inc. v. Walters* (1975) 48 Cal.App.3d 964, 971 [stating that ASFA's statutory purpose is to protect buyers from the abusive and unethical sales practices by automobile

[10] If the holder corrects the violation pursuant to section 2984, however, the buyer is not excused from payment of the unpaid finance charge. (§ 2983.1, second par.) There is no evidence here that Fireside corrected any of the alleged violations pursuant to section 2984.

sellers], (overruled on another point in *Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 815, fn. 18.)

Under Fireside's interpretation of paragraph three, however, a holder who acquired a conditional sale contract with [actual] knowledge of an ASFA violation could nevertheless enforce the contract without limitation if that holder is a bona fide purchaser. Fireside's interpretation would allow a holder with knowledge (albeit as a bona fide purchaser) to enforce the contract, an outcome patently at odds with the language of paragraph three. Such a contradictory interpretation, if adopted, would render nugatory the statute's clear directive that holders who take with knowledge should not be able to enforce the contract. Indeed, Fireside's interpretation would actually place a holder with actual knowledge in a better position than a holder without actual knowledge, because the latter is prohibited from recovering unpaid finance charges. (Compare § 2983.1, pars. 2 & 3.) Therefore, Fireside's interpretation of the statute conflicts with the Legislature's intent to place greater penalties on holders who take with knowledge of any of the specified ASFA violations. We are loathe to adopt Fireside's interpretation where it would frustrate the intent of the Legislature in this manner. (See *Dyna-Med, Inc. v. Fair Employment & Housing Com., supra,* 43 Cal.3d at pp. 1386-1387 ["Where uncertainty exists consideration should be given to the consequences that will flow from a particular [statutory] interpretation"].)

Based on our review of the statutory language, we adopt an interpretation of paragraph three's exception for a bona fide purchaser that comports most closely with the intent of the legislature. Under the interpretation we adopt today, a holder who takes with actual knowledge of a specified ASFA violation cannot be a bona fide purchaser within the meaning of paragraph three.[11]

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[11] Our interpretation accords with black letter California law that a bona fide purchaser must take without knowledge of another's rights. (See, e.g., *In re Marriage of Cloney* (2001) 91 Cal.App.4th 429, 437 ["It is 'black-letter law' that a bona fide purchaser for value who acquires his or her interest in real property without knowledge or notice of another's prior rights or interest in the property takes the property free of such unknown interests."]; *Melendrez v. D&I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1251 [bona fide purchaser must take without notice of another's rights].) Indeed, this consideration led Witkin to

In an attempt to avoid the conclusion we reach here, Fireside asserts that paragraph three "[b]y necessary implication . . . confer[s] bona fide purchaser status on a good faith buyer for value even if it takes with knowledge of the dealer's violation of section 2982(a)," citing *Scheas v. Robertson* (1951) 38 Cal.2d 119 (*Scheas*). *Scheas*, however, does not conflict with our statutory interpretation of the bona fide purchaser exception under paragraph three of section 2983.1.

In *Scheas*, plaintiff sought to enforce a lien on a parcel of real property based on an unforeclosed street improvement bond, issued in 1929, that had been in default since July 1933. In November 1948, plaintiff filed suit against defendants, who purchased the lot in January 1947. The trial court entered judgment for defendants because (1) under the 1945 amendment to section 2911 of the Civil Code (section 2911), "plaintiff was required to enforce the lien before four years had elapsed after the due date of the last installment of the bond or by January 1, 1947, whichever was later, and (2) that defendants were bona fide purchasers for value of the property after these periods had elapsed, and, as such, were entitled to the conclusive presumption [under the statute] that plaintiff's lien had been extinguished." (*Scheas, supra,* 38 Cal.2d at pp. 122-123.)

On appeal to the Supreme Court, plaintiff claimed the evidence did not support the trial court's finding defendants were bona fide purchasers. Plaintiff asserted the title report gave notice of the recorded status of his unpaid bond, therefore defendants could not be bona fide purchasers because they took with record notice. (*Scheas, supra,* 38 Cal.2d at p. 128.) The Supreme Court, however, affirmed defendants' bona fide purchaser status. The court observed that section 2911 specifically provided a conclusive presumption in favor of a bona fide purchaser for value that all liens were extinguished after a certain period of time had elapsed. (*Scheas, supra,* 38 Cal.2d at pp. 128-129.) The court reasoned that the ordinary rule that "one may not be classified as a 'bona fide purchaser for value' " if he or

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opine as follows regarding paragraph three's exception for a bona fide purchaser: "Presumably, the statute refers to enforceability by a *subsequent* taker, since a holder with knowledge cannot be a bona fide purchaser. (Citation.)" (4 Witkin, Summary of Cal. Law (10th ed. 2005) Sales, § 256, p. 235.)

she has record notice of an encumbrance was specifically modified by operation of the 1945 amendment to section 2911 in order to further the legislative purpose of remedying the "serious economic condition in land titles throughout the state." (*Scheas, supra,* 38 Cal.2d at p. 129.)

Under the statutory scheme at issue in *Scheas,* the issue of whether a buyer took with knowledge of an old lien became irrelevant to the bona fide purchaser calculus because such lien was presumed to be extinguished by operation of law. Contrary to the statutory scheme in *Scheas*, however, ASFA's section 2983.1 contains no language that conclusively confers bona fide purchaser status on one who takes with knowledge of any of the specified ASFA violations, or that operates to extinguish a violation after a certain time period. Moreover, unlike in *Scheas,* where conferring bona fide purchaser status on a buyer with knowledge of an old lien was in furtherance of the legislative purpose behind that statute, to confer bona fide purchaser status on one who took with knowledge of the ASFA violation would frustrate ASFA's purpose of protecting car buyers from unscrupulous car sales practices.

Accordingly, we reject Fireside's contention that Alarcon is not entitled to rescission because Fireside is a bona fide purchaser for value under paragraph three of section 2983.1. Rather, we conclude that under paragraph three a holder who acquires the contract with knowledge of the ASFA violation is not a bona fide purchaser within the meaning of paragraph three of section 2983.1.

3. Fireside's Knowledge of AW's ASFA Violations

Fireside further contends that even if the contract is unenforceable on the grounds Fireside took with notice of a violation, there is a lack of substantial evidence to support the trial court's finding that Fireside acquired Alarcon's contract with actual knowledge of AW's ASFA violations. Under California law, actual knowledge or notice "consists in express information of a fact" whereas constructive notice is "imputed by law." (§ 18.) Actual knowledge need not be directly proved but "like any other fact may be inferred from circumstantial evidence." (*Gantner & Mattern Co. v. Hawkins* (1949) 89 Cal.App.2d 783, 786.) We review the trial court's finding on this point under the substantial evidence standard of review, which "begins and ends with the determination as to whether, on the

entire record, there is substantial evidence, contradicted or uncontradicted, which will support the trial court's factual determinations. . . . Substantial evidence is evidence of ponderable legal significance, reasonable in nature, credible, and of solid value." (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 501; see also *Wollersheim v. Church of Scientology* (1999) 69 Cal.App.4th 1012, 1017 [substantial evidence review "accords deference to trial court findings made according to a preponderance in order to avoid de novo redetermination of every factual issue at the appellate level"].)

Initially, we restate ASFA's requirement that every conditional sale contract shall contain certain disclosures, including itemization of the *amounts* to be paid to public officials for vehicle license fees, registration, transfer and titling fees. (See § 2982, subd. (a)(2).) Under "Amounts Paid to Public Officials" in Alarcon's conditional sale contract, it shows $289 at line A for "License Fees;" $0 at Line B for "Registration/Transfer/Titling Fees;" $0 at LineC for "California Tire Fees;" N/A at line D for "Other;" N/A at line E for "Other;" and shows $289 at "Total Official Fees (A through E)." At trial, Alarcon called Georgette Brooks as an adverse witness. Brooks testified that she is a compliance specialist for Fireside Bank, a member of the California Bar, and is familiar with Fireside's practices with respect to the acceptance of motor vehicle sales contracts from dealers. Brooks stated that when Fireside receives a contract under a dealer agreement, certain items in the contract are checked for accuracy, including the annual percentage rate and finance charges. Brooks further testified that she is aware that "Amounts Paid to Public Officials" are required by law to be itemized on the contract. Brooks testified that the amounts paid to public officials on Alarcon's conditional sale contract (trial Exhibit 1) were not so itemized.

Brooks' testimony establishes that Fireside personnel examine and review each contract Fireside receives under a dealer agreement and Fireside's compliance specialist knows that under ASFA the "Amounts Paid to Public Officials" are required by law to be itemized on the contract. Moreover, when Brooks examined Alarcon's contract, which shows the aggregate sum of $289 for "Total Official Fees" paid to public officials (lines A through E on the contract), she stated that the amounts had not been itemized. This constitutes substantial evidence that Fireside acquired Alarcon's conditional sale contract

from AW with actual knowledge that the "Amounts Paid to Public Officials" had not been itemized on the contract as required by law. (Cf. *General Motors Acceptance Corp. v. Kyle* (1960) 54 Cal.2d 101, 108 (*General Motors*) ["failure of the contract to describe and itemize amounts to be paid as fees appears on the face of the contract and therefore [holder] could in no event properly claim that it had no notice of that defect"].)

Fireside presents, for the first time on appeal, the fact-specific argument that it acquired the contract without actual knowledge since the failure to itemize is not apparent from the face of the document, because the single fee amount shown ($289) may not have been "an aggregate, non-itemized sum including an amount for registration fees as well as license fees" — rather, "the $0 shown on the registration line might have been correct." In the first place, "[a]ppellant is not entitled to raise for the first time on appeal a theory that involves a controverted factual situation not put in issue below. (Citation.)" (*LaChapelle v. Toyota Motor Credit Corp.* (2002) 102 Cal.App.4th 977, 983; see also *Baugh v. Garl* (2006) 137 Cal.App.4th 737, 746 ["Points not raised in the trial court may not be raised for the first time on appeal"].) Moreover, Fireside presented no evidence at trial to support the theory now offered on appeal that the zero amount shown for registration fees might have been correct. Thus, we conclude that substantial record evidence supports the trial court's finding that Fireside acquired Alarcon's contract with knowledge of the ASFA violation.

4. Reasonable Diligence

As noted, section 2983.1 allows a buyer under an unenforceable conditional sale contract to rescind the contract and return the vehicle if he or she acts "with reasonable diligence." (§ 2983.1, fourth par.) Whether Alarcon exercised "reasonable diligence" to rescind the contract was a question of fact for the trial court to decide. (*Allen v. Sundean* (1982) 137 Cal.App.3d 216, 222; *Sylve v. Riley* (1993) 15 Cal.App.4th 23, 26.) We will affirm the trial court's finding of "reasonable diligence" if it is supported by substantial evidence. (*Stanislaus County Dept. of Child Support Services v. Jensen* (2003) 112 Cal.App.4th 453, 458 [applying substantial evidence review to a finding that noncustodial parent made reasonably diligent efforts to locate the custodial parent and child].) Under substantial evidence review, we resolve all conflicts in favor of the prevailing party, and we

indulge "all legitimate and reasonable inferences" in order to uphold the trial court's finding if possible. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571 [citation omitted].)[12]

Alarcon's trial testimony established that he purchased the vehicle after negotiations with an AW salesman conducted entirely in Spanish. The terms of the contract were memorialized in English and Alarcon was provided a copy in English. Alarcon speaks little English and cannot read in English. During negotiations, no one explained how much he would be paying in license fees, sales tax, document preparation fees or smog fees. Alarcon's supplemental testimony at the reasonable diligence hearing further established that because he thought he was paying too much in finance charges for the vehicle under the terms of the contract, he started asking his friends to see if they knew an attorney with expertise in vehicle sales. Later, he saw an advertisement for such an attorney in a Spanish magazine called El Avisador. On September 17, 2004, he went to visit the attorney. The attorney examined the contract and informed Alarcon that he had been overcharged for vehicle license fees and that other fees had not been itemized as required by law. Subsequently, Alarcon filed his complaint seeking rescission on October 1, 2004.

On this record we cannot say that the trial court erred in finding that Alarcon acted with reasonable diligence. Alarcon's testimony regarding his suspicion that he had overpaid

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[12] De novo review applies to a trial court's finding of reasonable diligence only in the criminal arena under certain limited circumstances. (See *People v. Cromer* (2001) 24 Cal.4th 889, 901 [due in part to the importance of the Sixth Amendment right at stake and in part to the fact "the trial court does not have a first-person vantage" point on the prosecution's out-of-court efforts to locate the absent witness, appellate courts should apply de novo review to a trial court's determination that the prosecution acted with reasonable diligence in attempting to locate an absent witness]; but compare *People v. Bunyard* (2009) 45 Cal.4th 836, 851 [declining to apply de novo review to trial court's decision to release a witness on his own recognizance who later did not appear at trial because that determination involves a balancing of competing constitutional rights as well as "an observation of the witness's credibility and demeanor that the trial court is uniquely in a position to make"].) Unlike in *People v. Cromer*, *supra*, no constitutional rights are implicated here and the trial court had a first person vantage point on the evidence presented at the due diligence hearing. Thus, substantial evidence review applies here.

for the vehicle may establish that he experienced buyer's remorse after his purchase. However, there is simply an insufficient nexus between Alarcon's generalized feeling of buyer's remorse, and his claim for failure to itemize the amounts paid to public officials, to support a conclusion that he failed to pursue his claim with reasonable diligence. In addition, the record here establishes that the contract was memorialized in English and no one explained to Alarcon, in his native tongue, amounts due for licensing fees and other titling fees. In sum, the totality of the circumstances described above provides substantial evidence for the trial court's reasonable diligence finding in favor of Alarcon.

Fireside, however, challenges the trial court's reasonable diligence finding by analogizing to cases applying the "discovery rule" used to determine when a plaintiff had sufficient knowledge of an injury to trigger the running of the applicable statute of limitations. For example, Fireside cites *Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 902 (*Gutierrez*) and *Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384 (*Kitzig*). However, *Gutierrez* and *Kitzig* are medical malpractice cases that apply the discovery rule in the context of distinguishing between knowledge of facts constituting an injury and knowledge that those facts state a particular cause of action. (See *Gutierrez, supra,* 39 Cal.3d at pp. 902-903 [one-year statute began to run "when plaintiff, aware of her unexpected hysterectomy . . . had been advised by a physician to sue . . . and decided to consult an attorney for that purpose," even though counsel told her she could not prove malpractice]; *Kitzig, supra,* 81 Cal.App.4th at pp. 1395-1396 [under "delayed discovery rule" (*id*. at p. 1395) the limitations period was not triggered by patient's subjective suspicion of malpractice where patient's concern was " 'immediately abated' after consulting with a respected medical doctor," (*id*. at p. 1396) there was no break in the patient's relationship with the malpracticing doctor, and "there is no objective basis for the patient to have known or discovered the alleged malpractice" (*ibid.*)].)

The analogy proffered by Fireside under these cases is simply inapposite. Here, the issue of reasonable diligence turns purely on the factual issue of when Alarcon learned or reasonably suspected that the contract did not properly itemize the amounts paid to public officials. Fireside's analogy might carry the day if Alarcon knew in March 2003 that the

contract did not properly itemize the amounts paid to public officials but waited to file suit until he consulted an attorney in September 2004 and learned he had a cause of action under ASFA. However, as discussed above, the substantial record evidence is to the contrary. Rather, substantial evidence supports the trial court's finding that Alarcon acted with reasonable diligence in pursuit of his claim but did not learn of the defect in the contract until he consulted with his attorney in September 2004.

Fireside also contends that ASFA's "reasonable diligence" standard derives from former section 1691 prior to its revision by the Legislature in 1961.[13] Fireside asserts that ASFA's "reasonable diligence" standard is actually less protective of car buyers than section 1691's current "promptness" standard governing rescission of contracts generally.

This contention lacks merit. By filing suit shortly after his attorney discovered the ASFA violations, Alarcon satisfied the requirements of section 1691, the general rescission statute. (See § 1691 [party is required to give notice of rescission "promptly upon discovering the facts which entitle him to rescind"].) Even under former section 1691, a person's "reasonable diligence" in seeking rescission was measured from the time that person learned of, or was placed on inquiry notice of, his or her right to rescind. (See, e.g., *Rodriguez v. Barnett* (1959) 52 Cal.2d 154, 161 [affirming that requirements of former section 1691 were satisfied where "[t]here was an express finding that the plaintiffs served on the defendant a notice of rescission within a reasonable time *after the ascertainment of the facts*," italics added]; *Gedstad v. Ellichman* (1954) 124 Cal.App.2d 831, 834 [former section 1691 "requires the party who wishes to rescind an agreement to use reasonable diligence to rescind promptly *when aware of his right* and free from undue influence or disability"].)

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[13] Former section 1691 provided in pertinent part: " 'Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of *reasonable diligence* to comply with the following rules: (1) He must rescind promptly, *upon discovering the facts which entitle him to rescind*, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind[.]" (*King v. Mortimer* (1948) 83 Cal.App.2d 153, 159, italics added.)

In sum, we conclude that the record contains substantial evidence that Alarcon acted with reasonable diligence after he discovered facts which supported his claims in September 2004. Alarcon filed his complaint shortly thereafter. Thus, the trial court's reasonable diligence determination must stand.

B. Offset

ASFA provides that when a buyer elects to rescind an unenforceable contract and return the motor vehicle, "[t]he value of the motor vehicle so returned shall be credited as restitution by the buyer *without any decrease which results from the passage of time in the cash price of the motor vehicle as such price appears on the conditional sale contract*." (§ 2983.1, fourth par. [italics added].) The parties offer different interpretations on this statutory language.

Fireside's statutory interpretation of section 2983.1 is based on the general rescission statutes. According to Fireside, sections 1691 and 1692 describe a two-step process of adjusting rights upon rescission: In the first step each party restores to the other all consideration received under the contract. In the second, each party pays the other for benefits received under the contract. Fireside asserts that section 2983.1 governs only the first step of the two-step rescission process but "says nothing about the value of the car's use during the time the buyer possessed and drove it." Therefore, according to Fireside, it is entitled to an offset for the "use value" of the vehicle under the second step of the rescission process.[14]

In his cross-appeal, Alarcon contends the trial court erred as a matter of law in allowing an offset for use. Based upon an examination of ASFA's legislative history, Alarcon asserts that the Legislature intended to abolish seller's offsets altogether when it enacted ASFA in 1961. Alarcon further asserts that the Legislature's use of the phrase "without any decrease which results from the passage of time" evidences an intent to

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[14] Fireside contends that reasonable use value is determined by the market lease price of the vehicle. Fireside states that the undisputed evidence at trial showed the fair market cost of leasing Alarcon's car for the period he possessed it was $12,719, and asserts the trial court erred by failing to allow Fireside that amount as an offset.

preclude an offset for use value as well. Therefore, according to Alarcon, to allow an offset for use value would run afoul of section 2983.1's proscription against such offsets.

Given these competing interpretations of the statute, we must first examine the language to determine whether its meaning is plain or the statute is ambiguous. (*Fitch v. Select Products Co, supra,* 36 Cal.4th at p. 818 [stating that under "well-established principles" of statutory construction, "[i]f the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls"].) Specifically, the question is whether the Legislature's reference to "any decrease which results from the passage of time in the cash price of the motor vehicle" precludes an offset in favor of Fireside for actual usage of the vehicle by Alarcon.[15] The express wording of the statute fails to provide a clear answer to this question. Accordingly, we look to pre-ASFA law and ASFA's legislative history in order to interpret its statutory language. (*People v. Jefferson* (1999) 21 Cal.4th 86, 94 [when statutory language is ambiguous court "look[s] to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part"] [citations omitted].)

ASFA was spawned by the Legislature's review of automobile sales financing laws in 1960. (Assem. Interim Com. on Finance and Insurance, Final Rep., 15 Assem. Interim Com. Reps. (1961) No. 24, 1 Appen. to Assem. J. (1961 Reg. Sess.) (report).) The report expressed its dissatisfaction with the distinction drawn by the courts between "formal" and

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[15] Consider an example where buyer pays $10,000 in cash for a vehicle; one year later buyer elects to rescind the contract pursuant to ASFA; as restitution, buyer returns the car; the statute means that seller must refund buyer $10,000 — seller cannot argue that the cash price of the car has depreciated by $2,500 due to the passage of time and return only $7,500 to buyer. However, what if buyer returns the vehicle in a substantially altered condition, e.g., with the rear end bashed in from a fender-bender accident? Under those circumstances, is the seller allowed an offset for the decrease in the cash price of the vehicle due to the damaged rear-end, or is the decrease in the cash price simply a result of "the passage of time" under the statute, thereby precluding any offset?

"substantive" (*id*. at p. 32) violations of the automobile sales financing laws.[16] In this regard, the report stated the "primary reason for the prevalence of some of the abuses in the field of automobile sales and financing . . . is that sellers are not deterred by present law . . . and buyers are discouraged by present law from seeking legal redress." (*Id*. at p. 29.) The report noted that under present law a seller who violates the formal requirements is allowed an offset against the buyer's recovery whereas a seller who violates the substantive requirements "is penalized by not allowing him an offset." (*Id.* at p. 32.) The report stated that the courts "seem to believe" that violations of the substantive requirements "are more serious than violations of the 'formal' requirements." (*Ibid.*) "The opposite is true[,]" the report stated, because "the many facets of writing a sale contract where there is room for abuse are mostly covered by the 'formal' requirements of the law." (*Ibid.*) The report further observed that "the apparent lack of violation by dealers of the [substantive provisions] may well be because the courts will not allow an offset to the dealer in such cases." (*Ibid.*) Finally, the report opined that the availability of an offset to a dealer who violates the formal requirements of the statute "make[s] it impossible to deter [the dealer] from violating them in the first place." (*Id.* at p. 33.) Under the present state of the law, the report observed, the buyer knows that if "he successfully prosecute[s] a civil action, the offset allowed the dealer may be so large, or nearly so large as the payments he will recover

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[16] See, e.g., *General Motors, supra*, 54 Cal.2d 101 which was on decided May 10, 1960, during the period the Assembly Interim Committee on Finance and Insurance was conducting its investigation into automobile sales and financing but before it published its final report in 1961. In General Motors, the assignee acquired from the car dealer a conditional sale contract that violated section 2982, subdivision (a) in that, among other things, it did not itemize and describe the fees paid by the dealer to public officials and was not signed by an authorized representative of the dealer. (*General Motors, supra*, 54 Cal.2d at p. 106.) To determine the rights of the parties under former section 2982, the Supreme Court first noted subdivisions (a) and (b) "are designed to enable the buyer to know just what his contract is" whereas subdivisions (c) and (d) "are directly aimed at excessive charges which are akin to usury." (Id. at p. 108.) The court observed that the "requirements of subdivisions (a) and (b) have been aptly called 'formal' and those of subdivisions (c) and (d), 'substantive.' " (*Id*. at p. 109.)

from him, and he will thus end up with no car at all and very little or no money to show for it." (*Id.* at p. 34.)

"The problems and concerns identified in the Legislature's review of automobile sales financing laws, as detailed in the report, demonstrates that ASFA was enacted to increase the protections for buyers under conditional sale contracts and provide additional incentives to dealers to comply with the law. Following the report, ASFA was enacted in July 1961 with an operative date of January 1, 1962. (Stats. 1961, ch. 1626, pp. 3534-3541.) ASFA repealed former sections 2981, 2982 and 2982.5. In their place, ASFA added a new chapter to the Civil Code that included a revamped section 2982, subdivision (a), prohibiting the execution of a contract containing blank spaces to the filled in later and setting forth all the separate items a conditional sale contract must contain. (*Id.* at pp. 3535-3537.) ASFA also added section 2983.1, which abolished the distinction between 'formal' and 'substantive' requirements of the regulatory scheme and provided the same rights and remedies for violations of subdivisions (a) [specifying disclosures to be contained in contract] and (c) [calculation of finance charge] of section 2982. (*Id.* at pp. 3536-3538.)

ASFA also proscribed one measure of restitution to the buyer that applies to *all* violations of the statute, whether 'formal" or "substantive,' namely, "the value of the motor vehicle so returned . . . without any decrease which results from the passage of time in the cash price of the motor vehicle as such price appears on the conditional sale contract." (§ 2983.1, fourth par.) This measure of restitution, consistent with ASFA's objective of increasing protections for buyers under conditional sale contracts, prevents sellers from crediting buyers only a portion of the purchase price on the grounds that the vehicle depreciated in value as soon as buyer drove it off the lot. It does so by precluding any offset for a reduction in the cash price of the vehicle "which results from the passage of time" (§ 2983.1, fourth par.), i.e., an offset for ordinary depreciation over time. However, ASFA's restitution provision does not, as asserted by Alarcon, bar all seller offsets.[17] Furthermore,

[17] If the Legislature had wanted to abolish offsets entirely and make the seller bear the full loss of any reduction in the value of the vehicle upon rescission, it could have done so

it does not specifically preclude an offset for depreciation attributable specifically to the buyer's prolonged use of the vehicle.

The authority for the distinction between a seller's offset for ordinary depreciation over time, which is precluded under ASFA, and one for depreciation on account of the buyer's use of the vehicle while in his possession, lies in pre-ASFA case law, in particular *General Motors, supra*. Under the maxim of statutory construction that the Legislature is presumed to be aware of existing laws and judicial decisions and to have enacted or amended statutes in light of this knowledge (see *People v. Overstreet* (1986) 42 Cal.3d 891, 897), *General Motors*, which was decided prior to ASFA's enactment, guides our determination of whether ASFA's restitution provision permits an offset for depreciation attributable to the buyer's use of the vehicle. In *General Motors*, the Supreme Court allowed a seller's offset " 'in an amount representing the depreciation in value of the car occasioned *by the use made of it by the buyer while in his possession*, which necessarily excludes any allowance for depreciation resulting from a general decline in the market value of such automobile during the period in question.' " (*General Motors, supra*, 54 Cal.2d at p. 111 [italics added, citing *Williams v. Caruso Enterprises* (1956) 140 Cal.App.2d Supp. 973, 980 (*Williams*).)

Moreover, while adopting the *measure* of offset enunciated in *Williams, supra*, 140 Cal.App.2d Supp. 973, the Supreme Court in *General Motors* stated that "the seller can in no event recover on the theory of offset more than an amount equal to that which the buyer is entitled to recover." (*General Motors, supra,* 54 Cal.2d at p. 111.) Finally, in adopting the *measure* of offset enunciated in *Williams*, the Supreme Court rejected several other measures of offset suggested by the lower courts, such as (1) the rental value of the car (because "such measure would improperly allow the seller a profit"); (2) the reasonable value of use of a conditionally sold car; and, (3) where a trade-in is part of the purchase, the

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simply by saying, "The value of the motor vehicle so returned shall be credited as restitution in full by the buyer."

"difference between rental value of the conditionally sold vehicle and the automobile traded in." (*Id.* at p. 111 & fn. 8.)

In our view, the measure of offset sanctioned by the *General Motors* Court furthers the policies behind ASFA because it does not allow a dealer guilty of violating the law to profit by an offset for the rental or reasonable use value of the vehicle, or for depreciation due to passage of time — offsets that could potentially swallow much of a customer's refund of the purchase price of the vehicle upon rescission. On the other hand, it fairly allows an offset to the seller, where appropriate, in compensation for any additional depreciation in the value of the vehicle, over and above that occurring in the normal passage of time, which is attributable to the buyer's use of the vehicle during his possession. Any seller's offset of this nature, however, may not exceed the amount which the buyer is entitled to recover under the contract.

In sum, we conclude that ASFA does not preclude an offset to the seller, where appropriate, for any "depreciation in the value of the car occasioned by the use made of it by the buyer while in his possession."[18] The measure of offset available to a seller under ASFA that we adopt today differs from the approach utilized by the trial court, and the parties have not had the opportunity to present evidence on it. Accordingly, we remand for the trial court to determine in the first instance the amount of offset, if any, which is to be allowed Fireside under the standard articulated above.

C. Attorney Fees

Fireside contends the trial court erred in two respects by awarding Alarcon attorney fees. First, Fireside contends the trial court awarded fees in excess of the express limits on assignee liability set forth in section 2983.5 of ASFA. Second, Fireside asserts that in determining the amount of attorney fees the trial court abused its discretion by applying a multiplier of 1.5 to the lodestar amount. We address each contention in turn.

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[18] Indeed, Alarcon concedes that section 2983.1 is consistent with what he terms a "Vehicle-Value" offset in cases "where a vehicle has been subject to extraordinary wear and tear, accident, or other damage while in the rescinding buyer's hands."

1. Attorney Fees under ASFA

Fireside's contention that the trial court's attorney fee award exceeds express statutory limits is based on its interpretation of the interplay between ASFA's attorney fee provision and ASFA's assignee liability provision. The attorney fee provision states in pertinent part: "Reasonable attorney's fees and costs shall be awarded to the prevailing party in any action on a contract or purchase order subject to the provisions of this chapter regardless of whether the action is instituted by the seller, holder or buyer." (§ 2983.4) The assignee liability provision states: "An assignee of the seller's right is subject to all equities and defenses of the buyer against the seller, notwithstanding an agreement to the contrary, but the assignee's *liability* may not exceed the amount of the debt owing to the assignee at the time of the assignment." (§ 2983.5, subd. (a) [italics added].)

Fireside reads these statutes to mean that: (1) section 2983.5 caps its assignee liability at $10,135.80 — the amount Alarcon owed on the contract when it was assigned to Fireside — and, (2) because the term "liability" means "any [ ] legal obligation to pay," and "an attorney fee award is a legal obligation enforceable by civil remedy," the cap on an "assignee's liability" liability under section 2983.5 must include any attorney fees awarded under section 2983.4. Fireside's statutory interpretation is unpersuasive.

Fireside acknowledges that its statutory interpretation would result in an "asymmetry in fee awards" by capping a buyer's award of reasonable attorney fees in an action against an assignee to the debt owed on the contract when purchased by the assignee, but placing no limitation on the reasonable attorney fees available to an assignee in an action against the buyer. Fireside argues, moreover, that this asymmetry favoring assignees furthers ASFA's legislative purpose of encouraging enforcement against "errant *dealers*, not suits against assignees."

Whereas we are mindful of the rule of statutory construction "which dictates that effect be given, if possible to every word, clause and sentence" of a statute (e.g., *Stewart v. Board of Medical Quality Assurance* (1978) 80 Cal.App.3d 172, 179), the fundamental goal of statutory interpretation is to ascertain the intent of the lawmakers in order to effectuate the purpose of the law, (see, e.g., *Kalway v. City of Berkeley* (2007) 151 Cal.App.4th 827,

833 (*Kalway*); *Lockheed Martin Corp. v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1237, 1241-1242). To this end, we do not read a statute in isolation, but rather construe it together with related statutes and consider it in the context of the statutory framework as a whole in order to ensure the literal meaning of the statute comports with its legislative purpose and does not conflict with related provisions. (*Kalway*, *supra*, 151 Cal.App.4th at p. 833.)

Fireside's statutory interpretation gives an expansive meaning to a single word in section 2983.5 — "liability" — and in so doing results in an asymmetrical fee structure. However, the larger statutory framework includes section 2983.4, the plain language of which specifically provides a symmetrical fee structure awarding reasonable attorney's fees to the prevailing party "regardless of whether the action is instituted by the seller, holder or buyer." Thus, Fireside's interpretation does violence to the rules of statutory construction because it interprets one word in section 2983.5 to defeat the plain meaning of section 2983.4, the section which specifically addresses attorney fees.

Furthermore, we reject Fireside's assertion that its statutory interpretation of an asymmetrical fee system furthers ASFA's legislative purpose. In fact, the opposite is true. ASFA's attorney fee provision at section 2983.4 is " 'part of an overall legislative policy designed to enable consumers and others who may be in a disadvantageous contractual bargaining position to protect their rights through the judicial process by permitting recovery of attorney's fees incurred in litigation in the event they prevail.' (Citations.) The Legislature's primary purpose in enacting section 2983.4 was to enable consumers with good claims or defenses to find attorneys willing to represent them in court, and also prevent the abusive practice of inserting into form contracts under the ASFA an unenforceable, one-sided attorney fee provision. (Citation.)" (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 150 (*Graciano*).) Fireside's interpretation of the attorney fee and assignee liability provisions would frustrate these stated legislative goals. Accordingly, on the basis of these considerations, we conclude Fireside's interpretation of ASFA's attorney fee provision is irreconcilable with ASFA's legislative purpose of "enabl[ing] consumers with good claims or defenses to find attorneys willing to represent them in court[.]"

(*Graciano, supra,* 144 Cal.App.4th at p. 150.) Therefore, we reject Fireside's contention that its assignee liability cap under section 2983.5 includes the attorney fees awarded to Alarcon. Thus, the trial court's attorney fee award did not exceed ASFA's limit on assignee liability.[19]

2. Amount of the attorney fee award

Fireside contends the attorney fee award should by reversed or reduced because the trial court's lodestar calculation was "unreasonably high" and the trial court abused its discretion by applying a multiplier of 1.5 without adequate explanation or justification. We disagree with Fireside's objection to the lodestar amount but agree with its contention that a multiplier is unwarranted.

A the trial court's calculation of the attorney fee award is reviewed for an abuse of discretion. (*Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 40-41.) In exercising its discretion, however, the trial court may not reweigh factors considered in determining the lodestar amount when considering whether the lodestar should be adjusted upward. (*Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615, 624 (*Ramos*).) Moreover, the trial court should provide a sufficient explanation for any upward adjustment of the lodestar. (*Ibid*.)

"The determination of what constitutes a reasonable fee generally 'begins with the "lodestar," i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate.' (Citation.) '[T]he lodestar is the basic fee for comparable legal services in the community; it may be adjusted by the court based on factors including, as relevant herein, (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award. [Citation.] The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court

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[19] Because we conclude the attorney fee award was proper under ASFA, we need not address Fireside's contention that the fee award exceeds the FTC holder rule's limit on assignee liability.

determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services.' (Citations.)" (*Graciano, supra,* 144 Cal.App.4th at p. 154.)

(a) Lodestar Calculation

In his motion for attorney fees, Alarcon requested a billing rate of $450 per hour. In a declaration accompanying the motion, Alarcon's attorney, Martin Putnam, recited the qualifications and experience of he and his two co-counsel on the case. Putnam declared that the "normal billing rate for professional services rendered in connection with the highly specialized area of claims for damages and/or other relief arising out of the purchase and sale of motor vehicles pursuant to the [ASFA] and Consumer Legal Remedies Act is $450 per hour." Putnam also declared he was "familiar with the prevailing rates charged for similar services to consumers arising out of the purchase and sale of motor vehicles by similarly qualified attorneys." Further, Putnam declared that "[b]ased on the specialist nature of the services" counsel provided, he believed that a rate of $450 per hour "to be within the normal range of billing rates for services by specialist attorneys with comparable education, experience and expertise." A spreadsheet attached as exhibit A to counsel's declaration described the activities of Putnam and his two co-counsel on the case as well as the time spent on each of those activities. The spreadsheet calculated counsel spent a total of 232.7 hours on the case, yielding a lodestar total of $94,295.50.

In its attorney fee order, the trial court noted that the "format and contents" of the spreadsheet suggested it "was based on the firm's internal time keeping and billing software." The trial court ruled, however, that due to a lack of foundation the spreadsheet was only admissible as evidence of declarant Putnam's time. Accordingly, the trial court calculated the lodestar based on the 191.6 hours Putnam spent on the case at $435 per hour for a total of $83,346.00. Stating that it had considered the "extent of effort reflected" in the record, "the complexity of the issues" and the "tenacity of the opposition" in light of "its own experience as a civil litigator in the community and a bench officer," the trial court concluded that "the resulting lodestar is reasonable and appropriate in this case." Our

review indicates that the trial court carefully considered its lodestar calculation based on applicable legal principles. (*Ramos, supra,* 82 Cal.App.4th at p. 624 [noting that " '[u]nlike the substantial evidence rule, which measures the quantum of proof adduced in the proceedings below [ ], the abuse of discretion standard measures whether, given the established evidence, the lower court's action "falls within the permissible range of options set by the legal criteria." ' (Citation.)"].) Accordingly, we cannot say its lodestar calculation amounted to an abuse of discretion. (Cf. *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140 (*Ketchum*) [trial court did not abuse its discretion in calculating lodestar where it was based on "detailed documentation by counsel" and "the prevailing hourly rate in the area for comparable services"].)

(b) Multiplier

In its motion for attorney fees, Alarcon contended that "[c]onsidering the contingent nature of this case, the legal uncertainties, and the risk assumed by Plaintiff that fees might have been awarded against him, the Court should apply a multiplier of no less than 2.25 to the lodestar." In its attorney fee order, the trial court for the most part discounted the factors relied upon by Alarcon in justifying a multiplier. The trial court stated: "The court acknowledges the risk presented by contingency fee litigation of this sort but notes that the risk is not as great as that presented in class action or similarly 'large exposure' cases. The discovery burdens and time to trial are not nearly as great, and the trial itself is relatively straightforward. Much of the work is in the briefing required to address the complex legal issues that a 'small' case such as this can nonetheless generate. This latter burden can be reduced when experienced counsel with extensive expertise in the subspecialty are involved, as was the case here. That experience was reflected in the rate already factored in the lodestar. For these reasons, a multiplier of the magnitude sought here is inappropriate. The

court finds 1.5 to be justified based largely on the contingency risk factor and the delay in collection until the final judgment."[20]

An adjustment to the lodestar figure to provide a fee enhancement reflecting the risk that the attorney will not receive payment if the suit does not succeed "constitutes earned compensation . . . intended to approximate market-level compensation for such services, which typically includes a premium for the risk of nonpayment or delay in payment of attorney fees." (*Ketchum, supra,* 24 Cal.4th at p. 1138.) The *Ketchum* Court acknowledged the "economic rationale for fee enhancement in contingency cases" in the following terms: " 'A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans.' (Citation.) 'A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.' (Citations.)" (*Ketchum, supra,* 24 Cal.4th at pp. 1132-1133.)

Under *Ketchum*, therefore, the contingent nature of the case may be a proper basis for the application of a fee enhancement. Nevertheless, any application of a fee enhancement or multiplier must avoid the pitfall of "unfair double counting" of factors already included in the calculation of the lodestar amount. (*Ketchum, supra,* 24 Cal.4th at p. 1138.) A fee enhancement for contingency, therefore, is only proper if the contingent nature of the work has not already been accounted for in the lodestar amount. In *Ketchum*, the court noted that it had previously allowed a multiplier in a contingency case where the loadstar was based on the "hourly prevailing rate for private attorneys in the community conducting *noncontingent*

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[20] We discount the use of the delay in collection as a factor separate and independent to the contingency risk factor. Every contingency case involves a delay in collection until final judgment.

litigation of the same type." (*Ketchum, supra*, 24 Cal.4th at p. 1133.) The court emphasized that applying a fee enhancement in a contingency case would not result in unfair double counting where "the unadorned lodestar reflects the general local hourly rate for a *fee-bearing case* [because] it does *not* include any compensation for contingent risk. . . ." (*Id.* at p. 1138 ["In this case, for example, the lodestar was expressly based on the general local rate for legal services in a *noncontingent* matter, where a payment is certain regardless of outcome"].)

Here, there is no evidence the lodestar was based on the general local hourly rate for a noncontingent matter. In his declaration, Putnam states that his "current area of specialization is the representation of consumers in automobile fraud cases" and his normal rate of billing for ASFA cases is $450 per hour. Similarly, Putnam states with respect to his co-counsels' practice in "the highly specialized area of claims . . . arising [under] . . . [ASFA]," the billing rate is $450 per hour. Putnam quotes comparable rates for other firms practicing in the area of consumer fraud. All the rates quoted by Putnam pertain to attorneys practicing in highly specialized areas of law such as ASFA that are subject to fee-shifting provisions. Most of this work is likely to be contingent, and yet Putnam provides no evidence on the rates that he, his firm, or any of the other firms charge where the matter is noncontingent. (*Ketchum, supra,* 24 Cal.4th at p. 1138 ["party seeking a fee enhancement bears the burden of proof"].) Accordingly, on this record the evidence does not support a fee enhancement and the trial court abused its discretion by applying a multiplier of 1.5. (*Ibid.* [fee enhancement based on the contingent nature of the case only avoids unfair double counting if the lodestar is based on "the general legal rate for legal services in a *noncontingent* matter"].)

DISPOSITION

This case required us to resolve various issues of statutory interpretation under ASFA, a statute enacted "to protect motor vehicle purchasers from abusive selling practices and excessive charges by requiring full disclosure of all items of cost." (*Thompson, supra*, 130 Cal.App.4th at p. 966.) We are mindful, however, that a de minimus violation of ASFA's disclosure requirements has resulted here in a sizeable attorney fee award that

appears disproportionate by comparison. (See *P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 Cal.App.4th 1047, 1049 [noting that in some cases "attorney fees become the tail that wags the dog in litigation"].) Nevertheless, this outcome follows from our statutory interpretation of ASFA as guided by the statute's above-noted legislative purpose.

In case No. A117148, we affirm judgment in favor of Alarcon and remand for the trial court to strike the offset awarded to Fireside and conduct further proceedings on the issue consistent with the standards outlined above. In case number A118566, we reverse the trial court's attorney fee order and remand with instructions that the trial court enter a new order awarding attorney fees to Alarcon in the lodestar amount only.

Each party shall bear his own costs on appeal.

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Jenkins, J.

We concur:

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McGuiness, P. J.

_____
Pollak, J.